STATE OF COLORADO

DEPARTMENT OF REVENUE

State Capitol Annex 1375 Sherman Street, Room 409 Denver, Colorado 80261 Phone (303) 866-3091 FAX (303) 866-2400



Bill Ritter, Jr. Governor

Roxanne Huber Executive Director

GIL-2008-036

December 18, 2008

Re: Sales Tax Exemption

Dear XXXXXXXXXXXX,

This letter is in response to your letter to the Colorado Department of Revenue regarding the taxability of XXXXX subcuticular Stapler and XXXXXX forceps. We issue both private letter rulings and general information letters. See, §24-35-103.5, C.R.S. and Department regulation 24-35-103.5. Private letter rulings are issued in response to tax questions relating to specific factual settings and are binding on the department. General information letters are issued in response to general tax questions and are not binding on the department. You can view this regulation online at:

http://www.revenue.state.co.us/taxstatutesregs/3921reg24-35-103.5.html

I am initially treating your request as a request for a general information letter. As noted above, general information letters are general discussions of tax law and are not a determination with respect to any particular factual setting. For this reason, this letter is not a determination that the company's products fall within any exemption. If you would like a private letter ruling, please take a moment to review the regulation and resubmit your request with the necessary information.

Issue

Are XXXXXXXX Subcuticular Stapler and XXXXXXX forceps exempt from sales and use tax?

Background

Your company sells XXXXXX Subcuticular Stapler and XXXXXXXX forceps. XXXXXXXX Subcuticular Stapler is a single-patient disposable product used to

deploy up to 25 staples used to close a surgical incision. The staples are made of bio-absorbable polymers that absorb into the body over a period of time. XXXXXXX forceps is used in conjunction with the XXXXXXXXX XXXXXXXXX forceps is a reusable, single forceps which allows a single clinician to close an incision in a simple, time-effective manner.

Discussion

The sales of materials furnished by a doctor as part of professional services to a patient are exempt from sales tax. §39-26-717(1)(a), C.R.S. In order to qualify for this exemption, the material must leave the doctor's office with the patient. For example, a splint furnished by the doctor to treat a fractured bone is exempt because it is furnished as part of the doctor's professional services to the patient and the splint leaves with the patient. Conversely, a physician is considered the consumer of products that do not leave with the patient and the physician must pay sales or use tax on such items. For more information about this exemption, see, FYI Sales 68, which is available on our web site at: www.revenue.state.co.us and go to Taxation > FYIs (sales).

In addition to this specific exemption for medical goods, Colorado also exempts sales of tangible personal property to charitable organizations (typically those entities that hold a 501(c)(3) certificate from the Internal Revenue Service). §39-26-718, C.R.S., Department FYI Sales 2 (Sales to Charitable Organizations). Similarly, sales to governmental entities performing governmental functions are also exempt. §39-26-704, C.R.S. For example, a county owned hospital or health clinic may qualify for this exemption. Compare, e.g., Nebraska Attorney General Opinion, 223, 03/28/1978 (county owned hospital is a government entity operating in a governmental capacity).

Although not expressly raised in your letter, the circumstances of your case also raises the issue of whether your company has responsibility to collect and remit Colorado sales or use tax for sales. In general, an out-of-state retailer must collect Colorado sales or use tax for such sales if the retailer is "doing business in Colorado." "Doing business in this state" is defined (§39-26-102(3), C.R.S.) to include the following activities:

- (3) "Doing business in this state" means the selling, leasing, or delivering in this state, or any activity in this state in connection with the selling, leasing, or delivering in this state, of tangible personal property by a retail sale as defined in this section, for use, storage, distribution, or consumption within this state. This term includes, but shall not be limited to, the following acts or methods of transacting business:
- (a) The maintaining within this state, directly or indirectly or by a subsidiary, of an office, distributing house, salesroom or house, warehouse, or other place of business;
- (b) The soliciting, either by direct representatives, indirect representatives, manufacturers' agents, or by distribution of catalogues or other advertising, or by use of any communication media, or by use of the newspaper, radio, or television

advertising media, or by any other means whatsoever, of business from persons residing in this state and by reason thereof receiving orders from, or selling or leasing tangible personal property to, such persons residing in this state for use, consumption, distribution, and storage for use or consumption in this state.

A number of federal court cases have limited the right of a state to impose on the retailer the obligation to collect state sales and use taxes. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In general, these cases require that the retailer have nexus with Colorado. In order to have nexus in Colorado, a retailer must have a some minimal physical presence in the state, either directly in the form of a store or indirectly through sales agents, and engage in regular, purposeful in-state sales activities specifically directed at in-state customers. *Complete Auto Transit, Inc.*, supra. For more information about this issue, see department publication FYI Sales 5 (sales tax information for out-of-state businesses).

Please note that the Department of Revenue administers state and state-collected city and county sales taxes and special district sales and use taxes, but does not administer sales and use taxes for self-collected home rule cities and counties. I urge you to contact these entities for information about the applicability of their taxes. You can visit our web site at www.revenue.state.co.us for more information about state and local sales taxes.

Pursuant to state law and department regulation 24-35-103.5, the Department will make public a redacted version of this letter. Your letter requesting this general information letter is not made public. I enclose a proposed redacted version of this letter. Please contact me within 60 days from the date of this letter if you have any questions, comments, or objection concerning the redacted letter.

I hope this is helpful. Please feel free to contact me if you have any questions.

Sincerely,

Neil L. Tillquist Colorado Department of Revenue Teelephone: (303)866-5627

Email: ntillquist@spike.dor.state.co.us